UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

Lincoln Technical Institute, Inc.

and

Case Nos. 22-CA-26784
22-CA-26981

American Federation of Teachers

Julie Kaufman, Esq., Newark, NY
Counsel for the General Counsel
Gerald L. Dorf, Esq., *(Dorf & Dorf)*
Rahway, NJ, for the Respondent
Joanna McAvoy, Staff Representative
Edison NJ, for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. Based upon charges filed by the American Federation of Teachers (the Union) in Case Nos. 22-CA-26784 and 22-CA-26981 on February 16, and June 29, 2005,[1] respectively, an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (the complaint) was issued on August 11 against Lincoln Technical Institute (Respondent).

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by advising certain of its employees that it was rescinding a pay increase previously provided to employees due to the fact that a petition for Certification of Representative had been filed by the Union. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by (1) rescinding a pay raise previously given to certain of its employees and (2) failing and refusing to provide a previously promised pay raise to certain of its other employees. The Respondent's answer, as amended, denied the material allegations of the complaint and on October 6 a hearing was held before me in Newark, New Jersey.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Respondent and by Counsel for the General Counsel I make the following

[1] All dates herein are in 2005, unless otherwise indicated.

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with a place of business at 70 McKee Drive, Mahwah, New Jersey, the sole facility involved herein, is engaged in the business of teaching vocational trades. Annually, the Respondent in conducting its operations, derives gross revenues in excess of $1,000,000.00 and purchases and receives at its Mahwah, New Jersey facility goods and supplies valued in excess of $50.000.00 directly from suppliers located outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

It was stipulated, and I find that the American Federation of Teachers (Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

Background

Respondent operates vocational training schools in 32 locations throughout the country, including one in Mahwah, New Jersey, the only facility involved in this matter. During the relevant period of time at issue, there were approximately 41 instructors employed at this facility, in addition to an unspecified number of other staff.

At issue herein is the Respondent's history of granting wage increases to its employees, as well as the manner by which such increases are calculated and awarded. A summary of wage data for the instructional employees at the Mahwah facility, prepared by Respondent, and stipulated into the record by the parties, shows the hourly salary history for current employees. These records demonstrate that instructors received salary increases as of January 1 for the years 2000, 2001, 2002, 2003, as of January 20 for 2004 and again, as of January 1 for 2005.[2] In addition, in about August 2003, employees received a further wage increase characterized as a "merit increase."[3] According to the testimony of Respondent's Executive Director Thomas Lynch, not all instructors received raises every year and the amounts awarded varied based upon a review of a particular instructor's performance and the recommendations made by members of the management team, department supervisors and the director of education.[4]

On January 21, the Union filed a representation petition with Region 22 of the Board

---

[2] As discussed below, the raises instituted in 2005 were rescinded.

[3] The January raises occurring in 2000-2002 are called "merit increases." Commencing in 2003 they are designated "annual review." There is testimony that the January 2005 raise would have fallen into this category as well.

[4] Records were submitted for 45 employees. Several of these employees are recent hires for whom no historical data is available. According to the records, on 11 occasions since 2000, employees who were eligible for January raises did not receive them. On eight of these occasions, the employees had been hired in the latter part of the prior year. The percentages awarded to employees ranged as follows: 2005 - 3% to 5%; 2004 - 1% to 4%; 2003 -1.24% to 4.52%; 2002 - 1.66% to 4%; 2001 – 2.86% to 9.52%. For the year 2000, the records show two current employees who received wage increases in the amounts of 1.65% and 1.66%.

seeking an election in a unit of employees including all full-time and regular part-time instructors and teachers employed by the Respondent at its Mahwah, New Jersey facility. [5] Thereafter, on January 24, Union contract administrator Seth Goldstein sent a letter to Executive Director Lynch stating in pertinent part:

> The NJSFT/AFT Local #6308 recently filed a representation petition with the National Labor Relations Board.
>
> As you may be aware, Section 8(a)(5) of the National Labor Relations Act specifically prohibits an employer from making any unilateral changes in "wages, hours and other terms and conditions of employment" prior to the union election.
>
> Accordingly, we expect Lincoln Technical Institute will adhere to its statutory obligations and refrain from unilaterally changing terms and conditions of employment, including increasing certain bargaining unit employees work week from four to five days.
>
> Finally, please be aware that in the event Lincoln Technical Institute violates the National Labor Relations Act we shall immediately pursue all of our legal remedies.

Former employee Gerard McVeigh was employed by the Respondent as an HVAC instructor for approximately three years, commencing in August 2002.[6] McVeigh testified that he customarily received wage increases on an annual basis, as of January 1 of each year. McVeigh received a total of four salary increases during the time he was employed by the Respondent. The first raise, granted in January 2003, was adjusted based upon his length of service for that first year. He subsequently received two "merit increases," in September and October 2003, as well as two "annual review" salary increases in the amounts of 3.03% and 2.99%, in 2004 and 2005.

McVeigh testified that, in early January 2005, he attended a meeting called for the entire staff, which was headed by Lynch and Director of Education Ken Jacobs. The employees were informed that the Mahwah facility had won certification as a school of distinction and that employees would be speaking individually with their respective supervisors regarding salary increases. Employees were also advised that the work week would be increased from four to five days. Subsequently, McVeigh received a wage increase of approximately three percent, which first appeared in his paycheck dated January 28. On February 5, McVeigh received a letter from Respondent, which states in pertinent part:

> A petition was recently filed with the National Labor Relations Board (NLRB) in Newark seeking union representation of instructors.
>
> The National Labor Relations Act and case law provide that an employer may not make any significant unilateral changes in wages, hours and other terms and conditions of employment during the pendency of a representation proceeding and election before the

[5] An election was subsequently held and the Union was certified as the exclusive collective bargaining representative of the unit. As of the time of the hearing, the parties were in the process of negotiating an initial collective-bargaining agreement.

[6] McVeigh testified that he was laid off shortly before the hearing commenced.

NLRB.

Therefore, the change which was inadvertently made in your last paycheck will be rescinded so that the Company is in compliance with the law and thereby avoid any potential accusation of improper activity during the pendency of the representation case. For your guidance the benefits in effect and or announced on or before December 31, 2004 such as compensation for unused sick days, remain in effect.

The return to your prior pay rate and the appropriate adjustment will be made with the next pay check on February 10, 2005.

We sincerely apologize for any inconvenience this may cause you.

The same letter was sent to 30 other employees who had all received wage increases in January 2005.

There were also ten employees who did not receive wage increases. These employees were sent the following letter:

A petition was recently filed with the National Labor Relations Board (NLRB) in Newark seeking union representation of instructors.

The National Labor Relations Act and case law provide that an employer may not make any significant unilateral changes in wages, hours and other terms and conditions of employment during the pendency of a representation proceeding and election before the NLRB.

Therefore, there will be no increases or adjustments in salary during the pendency of the National Labor Relations Board (NLRB) representation case to avoid any potential accusation of improper activity. We sincerely apologize for any inconvenience this may cause you.

For your guidance the benefits in effect and or announced on or before December 31, 2004 such as compensation for unused sick days, remain in effect.

Employee Steven Kent has been employed as an automotive instructor for the Respondent since March 2004. At his initial employment interview in December 2003, Automotive Supervisor Don Diliberto advised Kent that his starting salary would be $19.95 per hour, and that raises were to be given out at the first of the year in the range of three to five percent. Kent did not accept a position with Respondent at that time, but subsequently contacted Diliberto in the latter part of February 2004. They met in early March and Kent was again informed that the initial hourly rate remained unchanged and that employees received merit raises in January in the range of three to five percent.[7] Kent commenced working for Respondent in March 2004. In a conversation which took place in December 2004, Diliberto told Kent that he had recommended him for the full five percent raise, but that he would be receiving a pro-rata share based upon the fact that he had worked only ten months of the year. He was also told that he would see the increase in his salary in the first or second paycheck in January. Kent attended the January 2005 all-staff meeting described above. According to Kent, Executive Director Lynch told employees that Mahwah was an elite location and that employees would be

[7] Kent was also told that the Employer was planning to convert to a longer work week.

meeting with their supervisors to discuss raises during the next few weeks. In addition to Lynch and Jacobs, the meeting was attended by Diliberto, as well as two other department supervisors. Subsequently, Kent who did not receive a wage increase, learned that his coworkers had and questioned Diliberto, who stated that it was his understanding that no employee would be receiving a salary increase.[8]

Executive Director Lynch testified that after he received the January 24 letter from the Union, discussed above, he consulted with counsel and Vice-President Anthony Satanziani. A decision was made not to process the wage increases for the Mahwah instructors. Lynch called Director of Benefits Adele Stavish[9] and communicated instructions accordingly. Stavish, who is no longer employed by the Respondent, did not testify. Payroll Supervisor Antwane McCoy, who is employed at the Respondent's corporate office located in West Orange, New Jersey, supervises payroll for all school locations across the country. According to McCoy, earlier in the month, Stavish had previously provided information regarding wage increases for all school locations which he had "uploaded" into the Respondent's payroll system. He testified that on Tuesday, January 25, as he was running payroll, Stavish came into his office, gave him a revised payroll sheet for the Mahwah location and promptly left. The sheet removed the Mahwah instructors from the list of employees who were to be granted wage increases. McCoy forgot to follow Stavish's instructions and wage increases for Mahwah instructors were processed. McCoy testified that it was his understanding that all the instructors at the Mahwah location had been scheduled to receive wage increases and that, if they had gone through, they would have been retroactive to January 1. The non-instructional employees at the Mahwah location, not subject to the representation petition, received pay raises.

On January 28, Lynch learned that wage increases had been implemented for certain instructors. He issued the two letters discussed above. Lynch testified that the intent of the letters was to comply with the regulations that govern such matters, so that there would not be any perception of trying to influence the election and, additionally, that he acted in response to the letter that he had received from the Union. Lynch did not offer any testimony regarding the all-staff meeting or any discussion of wage increases which may have occurred during that meeting. Moreover, while Lynch testified generally that the wage increases which were awarded to employees were discretionary, he offered no specific testimony about the process Respondent utilized to decide who received salary increases, how the percentage amounts were determined or when Respondent had reached a decision regarding the distribution, amount and timing of the January 2005 raises. While Lynch testified, on cross-examination, that all instructors were "not necessarily" scheduled to receive wage increases, he did not specify who was not, in fact, scheduled to receive such an increase in January 2005.

Analysis

The complaint alleges that, by advising certain of its employees that it was rescinding their wage increases Respondent violated Section 8(a)(1) of the Act. General Counsel further alleges that, by rescinding certain employees' wage increases and by failing and refusing to provide a previously promised wage increase to other employees, Respondent has violated Section 8(a)(1) and (3) of the Act.

---

[8] Diliberto did not testify, and Respondent offered no evidence to rebut Kent's account of his discussions with him.

[9] The transcript reads "Stabish," however in its brief, Respondent advises that this individual's correct name is "Stavish." I treat this as a motion to correct the record in this regard which is hereby granted.

In defending its actions, Respondent disputes the General Counsel's contention that the wage increases were "promised" to employees, asserting that the raises were fully discretionary as to eligibility, nature and timing. Respondent contends that, at most, employees were informed that they would be meeting with their supervisors in the near future to discuss raises, with no specific date given. Respondent argues that the granting of wage increases was "inadvertent" and that the subsequent rescission of these increases represented a lawful effort to avoid interference with a pending election. Respondent notes that the Board has held that the conferral of an economic benefit by an employer during the pre-election period has itself been held to be a violation of the Act and that, accordingly, the Board has upheld the right of an employer to withhold a contemplated wage increase and to postpone an announced wage increase where an employer wanted to ensure that it did not interfere with an election. Respondent further argues that it has a legal right not to grant discretionary wage increases during the pendency of a representation petition and that, given the Union's demand that no unilateral changes be made, it became incumbent upon management to refrain from making any wage increase which could be viewed as an unlawful attempt to influence the election. Respondent notes that the letters sent to employees do not make any statements that disparage or undermine organizing activity, argues that there is no evidence of animus, and points to the fact that the Union won the election by a wide margin. In the absence of such evidence of discriminatory motive, Respondent argues that the evidence supports a finding that the sole reason for the wage rescission was to avoid the appearance that it sought to interfere with employee free choice in the election.

It is well settled that, "[a]s a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer's course of action is prompted by the union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the Union." *The Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn.1 (1967) (citations omitted).

The Board has held, however, that an exception to this rule is that "an employer may postpone such a wage or benefit adjustment so long as it 'makes clear' to employees that the adjustment would occur whether or not they select a union and that the 'sole purpose' of the adjustment's postponement is to avoid the appearance of influencing the election's outcome." *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991), quoting *Atlantic Forest Products*, 282 NLRB 855,858 (1987). Nonetheless, . . . "an employer must avoid attributing to the union the 'onus for the postponement of adjustment in wages and benefits,' or 'disparag[ing] and undermin[ing] the [union] by creating the impression that it stood in the way of their getting their planned increases and benefits.' " *Atlantic Forest Products*, supra, quoting, in part, *Uarco, Inc*., 169 NLRB 1153, 1154 (1969).

In this regard, Board has additionally held that, "while an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be deferred until after the election – regardless of the outcome." *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000) (footnote and citation omitted). See also *KMST-TV, Channel 46*, supra at 382, citing *Atlantic Forest Products* 282 NLRB at 858 (1987).

As noted above, Respondent argues that its wage increases were fully discretionary as to eligibility, amount and timing and, moreover, were never promised to employees. As an initial matter, the fact that Respondent retains the discretion to determine whether salary increases will be granted to particular employees does not warrant a finding that this is not a condition of employment subject to the general rule. The Board, with court approval, has held that merit

wage increases based upon performance assessments are not subjective and discretionary when the practice is an established one. *Eastern Maine Medical Center*, 253 NLRB 224 (1980), enfd. 658 F.2d 1 (1st Cir. 1981). See also *Otis Hospital*, 222 NLRB 402, 404 (1976), enfd. 545 F.2d 251, 255 (1st Cir. 1976); *Allied Products*, 218 NLRB 1246, 1252 (1975), enf. granted in part 548 F.2d 644 (6th Cir. 1975) (regular merit wage review and/or increase program is a term and condition of employment.) Respondent stresses that the amount awarded to any individual employee varied and was subject to management discretion. However, the Board has held that if an employer has an established policy of conducting salary reviews and granting wage increases, the fact that the specific amount of the increase is not predetermined is not significant. *Eastern Maine Medical Center*, supra; *Otis Hospital*, supra.

Contrary to Respondent's contentions, the evidence supports the conclusion that an annual wage increase is an established feature of Respondent's overall wage or compensation system, that it normally would have been implemented as part of a schedule of wage increases established by past practice and that this practice had been in effect for several years prior to the Union's seeking to organize Respondent's employees. As noted above, the payroll information submitted by Respondent shows that, during each annual period, a significant majority of employees who were eligible for raises received them, the primary exception being those employees who had been hired in the latter part of the prior calendar year. The record further establishes that Respondent's employees were aware of this practice and there is unrebutted testimony is that this policy has been explained to employees as a condition of employment. I additionally find, based upon McCoy's testimony that he had "uploaded" the wage data earlier in the month, and the lack of any testimony to the contrary, that the specific amounts of the January 2005 wage increase had been finalized by the time the Union filed its petition.

The evidence further establishes that, after the Union filed its petition, Respondent suspended its past practice of granting annual salary increases and, as of the date of the hearing in this case, had not reinstated it, even though the election had already been held.

In support of its position, Respondent relies upon *Singer Co*., 199 NLRB 1195 (1972.)[10] However, in that instance, as Board found, the alleged unfair labor practices involved the suspension of benefits which were not granted "pursuant to any fixed practice, pattern or preorganizational announcement, but the timing and eligibility of the benefits were purely within the discretion of the employer." 199 NLRB at 1196. See also *Village Thrift Store*, 272 NLRB 572-573 (1983), (in situations where "the benefits at issue have been provided only in a 'haphazard fashion,' . . . "the Board has resolved this dilemma by permitting employers to tell their employees that those benefits previously provided in an indefinite manner will be deferred during the pendency of organizational efforts where they make clear that the purpose is doing so is to avoid the appearance of interference.")

Moreover, the evidence establishes that the January 2005 wage increase was specifically announced to employees at a time prior to the filing of the petition. Cf. *Great Atlantic & Pacific Tea Co*., 192 NLRB 645 (1971). As McVeigh and Kent testified, in early January, employees attending a staff meeting were informed that they would, in fact, be receiving raises. I reject Respondent's contention, as stated in its brief, that while the General Counsel's witnesses made "allusion to wage increases being generally discussed, "neither witness could confirm that any promises were made at that meeting or at any point thereafter." I find it inherently implausible that Respondent would announce to its entire staff that they would be

[10] In its brief, Respondent inadvertently cites this case as "*NLRB v. Singer Company*."

discussing wage increases with their supervisors if Respondent did not intend to convey the impression that these increases were to be granted. Moreover, I note that Lynch, who conducted the meeting, offered no testimony on this matter. Clearly, Respondent had ample opportunity to elicit testimony from Lynch regarding what was said to employees on this occasion. I find this failure to do so warrants an adverse inference that, had Lynch or other management representatives testified about what was told to employees at the meeting, such testimony would not have been favorable to the Respondent. *GATX Logistics*, 323 NLRB 328, 331 fn. 9(1997); *Asarco, Inc*., 316 NLRB 636, 640 (1995). Finally, it is apparent from subsequent events that Respondent did, in fact, intend to grant wage increases to its employees.

In the instant case, I conclude that Respondent has not sufficiently complied with the standards set forth in *Atlantic Forest Products*, supra, and other cases cited herein to avoid liability. This is so for various reasons. First, I note that Respondent did not advise employees that it was postponing granting wage increases with the "sole purpose" of avoiding the appearance of interference with the election. Rather, Respondent informed its employees that the Act and case law provides that it may not make "significant unilateral changes . . . during the pendency of the representation petition and election." This statement is incorrect for, as explained above, such changes may lawfully be made if they would have been had the union not been on the scene. Moreover, Respondent failed to assure employees that they would receive the wage increase regardless of the outcome of the election. The Board has held that such assurances are required "to avoid placing the onus of the employer's decision upon the union." *H.S.M Machine Works*, 284 NLRB 1482, 1484 (1987) (citations omitted); *Noah's Bagels*, supra (and cases cited therein).[11]

Respondent posits that it was faced with a "Catch 22" in that, if it had granted the wage increases, it would have been subject to "potential accusation[s] of improper activity" during the pendency of the representation case. This argument has been viewed with some sympathy by the Board and the courts. Nevertheless, in circumstances where, as here, an employer has deviated from an established prior practice of conferring benefits, withdrawn a previously announced benefit or otherwise has not complied with the requirements of the Act, the Board has found such a defense to be unavailing. See e.g. *Dorn's Transportation Co.*, 168 NLRB 457 (1967), enf. denied in relevant part, 405 F.2d 706 (2d Cir. 1969); *GAF Corporation* 196 NLRB 538 (1972), enfd. 488 F.2d 306 (2d Cir. 1973); *Otis Hospital*, supra.[12] In this regard,

---

[11] In its brief, Respondent also cites *Uarco, Inc*. supra, for the proposition that the Board has upheld the right of an employer to postpone an announced wage increase during the pendency of an election. However, in that case, and unlike the situation herein, the Board concluded that the employer's behavior did not support objections to an election where the totality of the evidence established that "[t]he Employer made clear in its campaign statements. . . that whether or not its employees were represented by a union, it planned to continue its established practice of adjusting wage rates in early April of each year, pursuant to its annual wage survey, to bring them into conformity with prevailing rates in the area; and that the sole purpose of its announcement postponing the expected adjustments in wage rates and benefits for the employees involved was to avoid the appearance that it sought to interfere with their free choice in any elections which might be directed." Id at 1154.

[12] In *Noah's Bagels*, supra at 193, Member Brame, in dissent, wrote that "sound labor policy requires the Board to acknowledge the dilemma of well-meaning employers under current law and to provide guidance for identifying a viable and lawful course of action" and endorsed the following approach, set forth by the court in *NLRB v. Otis Hospital*, 545 F.2d 252, 254-255 (1st Cir. 1976):

> Withholding a wage increase during a union organizing campaign has been held to violate section 8(a)(1) of the Act under any of three conditions: if the increase was promised by the employer prior to the union's appearance; if it normally would be

Continued

Respondent's reliance upon *Dorn's Transportation Co*., *supra,* is misplaced. In that case the Board, reversing the trial examiner, found that the respondent violated the Act by "withholding salary increases which it would have granted had there been no organizing campaign and so advising its employees. . .[t]his so despite the fact that the Respondent may have believed that it could not grant any raises because of a pending petition." Id. (footnote and citation omitted). I note that the Second Circuit denied enforcement of the Board's order in this regard. However, the court specifically observed that "[t]his is not a situation where the employer has by public announcement specifically advised the employees that the union is causing them to lose a wage increase they otherwise would have received. . .[n]or did the Company fail to give a pay raise which it had previously announced would be effective on a specific date." 405 F.2d at 715 (citations omitted.)[13]

In the instant case, Respondent was faced with two lawful options: it could have either granted the increase in the normal course of operations, or it could have postponed the increase in accordance with the criteria described above. In this regard, unlike the situation in *Uarco*, cited by Respondent, where the employer followed through on its announcement and retroactively instituted the postponed wage increase after the election, employees have still not received their promised benefit. Had Respondent sought merely to postpone the benefit until after the election, this is a course of action it could have taken.

Respondent additionally relies upon Goldsmith's January 24 letter cautioning against making any unilateral changes in "'wages hours and other terms and conditions of employment' prior to the union election." I find that Respondent, which at that time had no legal obligation to

---

granted as part of a schedule of increases established by the employer's past practice;
or if the employer attempts to blame the union for the withholding.

I note that, under this standard, Respondent would be found to have violated the Act as there is substantial and largely uncontested evidence that its actions, at the least, met the first two of these enumerated criteria.

[13] Similarly in *J.J. Newberry Co. v. NLRB*, 442 F.2d 897, 900 (2d Cir. 1971), the court declined to enforce the Board's order where wage reviews were fairly regular but increases were subjective and discretionary. The court found that the status quo was unclear because wage increases were neither "automatic nor uniform." Thus, the company could have refrained from giving an increase to any particular employee without departing, on the face of the matter, from its "fairly regular" practice. In *Jeffco Manufacturing Co*., 211 NLRB 787, 790, enf. denied 512 F.2d 1248 (4th Cir. 1975), discussed in further detail below, the administrative law judge, affirmed by the Board, observed that "the Second Circuit's position has not been accepted by the Board which has since those cases [*Dorn's* and *Newberry*] continued to reiterate the principle that 'during an organizational campaign an employer must decide whether or not to grant improvements in wages and benefits in the same manner as it would absent the presence of the Union'" (citations omitted). Similarly, in *Plasticrafts, Inc*., 234 NLRB 762 fn. 1 (1978), the Board found a violation where the respondent withheld wage increases which would have been granted to employees but for a moratorium imposed during the pendency of a representation proceeding and subsequent collective-bargaining negotiations. In discussing the respondent's reliance on the Second Circuit's opinion in *Newberry*, the Board noted that it "respectfully disagree[d] with the court's holding. . ." In *NLRB v. Hendel Manufacturing Company*, 483 NLRB 350, 353 (2d Cir. 1973), the Second Circuit, despite its earlier refusal to enforce the Board's orders in *Dorn's* and *Newberry*, supra, noted: "An employer who in good faith at a time when he did not know of union activity had promised a raise, when he learned of the union activity could have taken the position publicly that whether or not the union activity succeeded the raise would go into effect. That would have been a plain declaration of neutrality and no one rightly could have criticized it adversely. . . Here, to cancel the raise was obviously susceptible of being understood by employees as interference with their union organizational efforts. And the Board was warranted in so finding and concluding." In my opinion, the circumstances of the instant case lend themselves more readily to this latter view.

recognize or bargain with the Union, cannot rely upon the Union's general demand or untimely assertion of its rights under Section 8(a)(5) as a defense. In so concluding, I find that the essence of the "unilateral" change at issue herein is not the granting of the salary increase, but the withholding of it. The Board was faced with a similar situation in *Jeffco Manufacturing Co.*, 211 NLRB 787, 788 (1974), enf. denied 512 F.2d 1248 (4th Cir. 1973), where the petitioning union wrote a letter wherein "[i]t is suggested that pending the outcome of these proceedings you make no changes in personnel, wages or working conditions." The administrative law judge, affirmed by the Board, found that, the employer could not rely upon the union's request that no unilateral changes be made, concluding that such a request "would have nothing to do with what the Company was legally obligated to do." Although the letter asked the employer not to make any changes, the "gravamen of the violation here is that the company did make changes – it withheld increases that would have been given to employees because of the Union's petition. " Id. at 790.[14]

Respondent further argues that there is no evidence of discriminatory motivation in this case, pointing to the fact that it ran a positive campaign and that the Union ultimately prevailed in the election. I note that in *Jeffco*, supra at 789, the administrative law judge, affirmed by the Board, made similar findings but nonetheless concluded that the respondent had violated Section 8(a)(1) of the Act, as alleged. In the circumstances presented by this case, I similarly conclude that the statements contained in the Respondent's letters to employees, which contain inaccurate statements of law and fail to provide the necessary reassurances, have a tendency to interfere with and restrain employee freedom to choose whether they desire a bargaining representative, and this is so regardless of Respondent's motive. I find, therefore, that such statements are violative of Section 8(a)(1) of the Act. I further find that Respondent's marked departure from its past practice and contravention of its promise to employees in rescinding or withholding the 2005 wage increase constitutes an independent violation of Section 8(a)(1) of the Act for the same reasons. *Dorn's Transportation Company*, supra.[15]

With regard to the General Counsel's Section 8(a)(3) allegations, I agree with the Respondent insofar as there is no *additional* evidence of discriminatory motive in the record before me, other than that which is established by the Respondent's conduct as described herein. However, the Board has held that an employer violates Section 8(a)(3) of the Act when, prior to a union campaign, it suspends an established wage increase policy unless the employer "postpones the increases only for the duration of the campaign and informs the employees at the time of the postponement that the sole reason for its action is to avoid the appearance that it seeks to intervene in the election and the Board finds that this in fact was the reason." *Smith &*

---

[14] The Fourth Circuit, apparently relying upon the union's letter and its determination that that "the granting of merit wage increases would have resulted inevitably in charges of unfair labor practices" denied enforcement of the Board's order, citing among other cases, the Second Circuit's opinions *Dorn's* and *Newberry*, supra. As noted above, the Board has indicated its disagreement with the court's rationale in these cases.

[15] See *Plasticrafts, Inc. v. NLRB*, 586 F.2d 185 (10th Cir. 1978), enfg. as modified 234 NLRB 762 (1978) (in cases where there is a clearly established departure from past practice, there is no requirement that the withholding of a wage increase was motivated by animus); *GAF Corporation*, supra at 538(in affirming the administrative law judge in finding that the respondent had violated both Section 8(a)(1) and (3) of the Act the Board relied upon the trial examiner's discussion of the necessity for a motive by the employer to interfere with employees' free choice "only in the circumstances of this case and only with respect to the violation of Section 8(a)(3)." See also *NLRB v. Hendel Manufacturing Co*., supra ("The legislative mandate [of the Act] prohibits interference whether intentionally interfering or not, whether pursuant to bona fide, competent advice of an expert or not.")

Smith Aircraft Company, 264 NLRB 516, n. 2 (1982) and cases cited therein; *Times Wire & Cable Co*., 280 NLRB 19, 30 (1986). I conclude that in this case there was a clearly discernable status quo with regard to wage increases established both by past practice and as a result of the Respondent's representations to its employees, and that this status quo would have been objectively apparent not only to an employer in Respondent's position, but to its employees as well. Respondent failed to postpone the wage increase only for the duration of the campaign and further failed to inform employees that the sole reason for its actions was to avoid the appearance that it sought to intervene in the election. I further find that, insofar as its legal defenses lack merit, Respondent has furnished insufficient evidence to support a determination that it had a cognizable neutral business justification for its decision to rescind or withhold the wage increases, which was admittedly in direct response to the Union's actions in seeking to represent its employees.[16] I additionally find that, given the totality of the Respondent's conduct, employees' wage increases were withheld, and not merely postponed, again in direct response to the filing of the petition.[17] Under these circumstances, I conclude that the Respondent has violated Section 8(a)(3) of the Act as alleged in the complaint. [18]

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By advising its employees that it was rescinding a wage increase, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By rescinding a wage increase previously given to employees and by refusing to provide a wage increase to other employees, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The above violations are unfair labor practices affecting commerce within the meaning of the Act.

---

[16] Respondent's assertion that it took action upon the advice of counsel fails to relieve it of liability when the action it took is a violation of the Act. See *G.C. Murphy Co*., 223 NLRB 604, enfd. 550 F.2d 1004 (4th Cir. 1977); *Great Atlantic & Pacific Tea Co*., supra. Similarly, Respondent's mistaken belief that it was complying with the requirements of the Act is no defense. See *Dorn's Transportation Co*., supra.

[17] Moreover, I note that Respondent acted in a context where its other employees, not subject to the petition, received wage increases. See e.g. *Medical Center at Bowling Green*, 268 NLRB 985 (1984) (respondent found to have violated Section 8(a)(1) and (3) of the Act when it gave raises to employees outside the petitioned-for unit, but withheld them from unit employees.)

[18] The record clearly establishes that wage increases were scheduled to be, and were in fact implemented with respect to 31 of Respondent's instructional employees. However, the record is silent as to why salary increases were not processed for the remaining ten employees. When asked about this, Lynch testified that all instructors were "not necessarily" recommended to receive raises; however, he offered no specifics. McCoy testified that all of Respondent's Mahwah instructors were previously scheduled to receive raises, retroactive to January 1. In addition, there is evidence that all employees were told that they would be discussing wage increases with their respective supervisors. Based upon this record, I find that all or substantially all of the instructional employees were scheduled to receive wage increases. If, however, a compliance investigation determines otherwise, the scope of the recommended remedy and order herein should be modified accordingly.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed to grant employees a wage increase which was due to them, I find that it must be ordered to pay the employees the amount of money improperly withheld from them, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Lincoln Technical Institute, Mahwah, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining and coercing its employees in the exercise of their rights under Section 7 of the Act by advising its employees that it is rescinding a wage increase previously provided or promised to them because the Union had filed a petition for a Certification of Representative with the National Labor Relations Board.

(b) Rescinding or otherwise refusing to provide wage increases to its employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

(c) In any other like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, advise employees of its intention to and provide to its employees the wage increases previously rescinded or not provided to them, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facility in Mahwah, New Jersey copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2005.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 12, 2006.

_____
Mindy E. Landow
Administrative Law Judge

[20] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell you that we are rescinding wage increases due to you because of your activities on behalf of or support for the American Federation of Teachers or any other union.

WE WILL NOT rescind or refuse to provide previously promised wage increases due to you because you joined or assisted the Union and engaged in concerted activities, or to discourage you from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make you whole for any loss of earnings and other benefits resulting from our discrimination against you, plus interest.

LINCOLN TECHNICAL INSTITUTE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.